LLOYD L. JONES

IBLA 92-6 Decided January 8, 1993

Appeal from a decision by the California State Director, Bureau of Land Management, modifying mining plan of operations 3809/CAMC 151174.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Plan of Operations--Mining Claims: Surface Uses--Wilderness Act

   A determination by an authorized officer that dredging operations capable of moving over 2,400 yards of earth annually within the meaning of 43 CFR 3809.0-5 from the Merced River did not constitute "casual use" was not overcome by an allegation that less than 5 acres of land would be disturbed by such activity.

2. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Surface Uses: Wilderness

   A reclamation bond was properly required for operations conducted within a wild and scenic river study area pursuant to a plan of operations. 43 CFR 3809 1-9(b).

APPEARANCES: Lloyd L. Jones, Midpines, California, pro se; D. K. Swickard, Folsom Area Manager, Folsom, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Lloyd L. Jones has appealed from a July 30, 1991, decision by the California State Director, Bureau of Land Management (BLM), that modified his mining plan of operations 3809/CAMC 151174. The State Director's decision modified his existing plan of operations by limiting the scope and duration of mining by dredging, establishing minimum standards for maintenance of cables used to anchor dredging equipment, prohibiting maintenance of permanent camps in connection with dredging, and requiring reclamation and the posting of a reclamation bond. The amount of the reclamation bond

was established at $1,000 by an implementing decision also issued on July 30, 1991. Appellant challenges both the modification of his plans and the requirement that he post a reclamation bond.

Appellant contends that no plan of operations is required for his operations, which consist mainly of dredging on the Merced River, because his activity amounts to "casual use" as that term is used by 43 CFR 3809.1-4(b). The stretch of the Merced River where appellant proposes to dredge was designated part of a wild and scenic river in 1987 by P.L. 100-149. In April 1988, appellant's co-claimant filed a mining plan of operations with BLM that recited:

> This mining operation will consist primarily of suction dredging and prospecting. This work will be within the high water mark of the Merced River. Work will usually occur year-round except for periods of high water or high sedimentation. The Merced/Yosemite railroad grade will be used for access to the claim. Mining will be diligent and will occur each year.
>
> No permanent living facilities or storage sheds will be placed on the claim. Because of high density traffic and easy accessibility to the claim a watchman occupying a van, camper, and or tent will be necessary to guard the equipment against vandalism or theft. No cable or other obstruction will be placed in or across the river in a manner that will interfere with other users of the river.
>
> High waterflows will reclaim and fill holes created by the mining operation. Should high water not reclaim the area, a suitable method of reclamation will be worked out with the authorized officer.
>
> It is understood that Federal, State and local laws and regulations must be met, and that failure to follow this plan of operations will result in the issuance of a notice of noncompliance.

(Plan of Operations dated Apr. 14, 1988).

On June 18, 1991, the Folsom, California, Area Manager, BLM, gave appellant notice to show cause why operations under his prior plan, quoted from above, should be allowed to continue or whether the plan should not be rescinded, because "our observations show you do not dredge year round. In fact, you operate only at the low water levels of summer. Dredging is seasonal, part-time and intermittent. This observation is based upon years of observation of your claims" (Decision dated June 18, 1991, at 1).

In response to this decision, an appeal was taken to the State Director, alleging that the findings made by the Area Manager were false, and had previously been rejected by prior decision of the Federal courts

and this Board. The Director, however, determined that the plan of operations should be modified to conform to actual operations and to prevent unnecessary and undue degradation of the public lands. The Director found that a plan of operations and reclamation bond should be furnished by appellant, relying in part on an environmental assessment (EA) prepared by BLM staff on April 3, 1991. The EA stated that appellant's operations had interfered with the operation of a public campground and that his "placer mining operations have not been conducted in a diligent manner. [His co-claimant] dredges at most a few weeks each year during the suction dredging season." Id. at 6. 1/

Appellant does not address these matters directly. He contends that his operations fall within a regulatory exception excusing a need to file a plan of operations or a reclamation bond because "casual use is defined in 43 CFR 3809.1-3(a) [as] disturbance of 5 acres or less. Note: We have been working this claim since 1976 and haven't disturbed 5 acres" (Statement of Reasons at 1). It is contended further that "no bond shall be required for operations that constitute casual use. [And yet] BLM, Folsom Resource Area will not allow us to place a 'notice' as 43 CFR 3809.1-3(b) allows." Id. at 2.

BLM has responded to this argument that:

> Mr. Jones operation exceeds the level of casual use. Suction dredges are mechanized earth moving equipment. They are machines driven by gasoline engines. * * * Suction dredges of the size used by Mr. Jones are capable of moving a volume of about 10 yards of material per hour. Assuming a 4 hour work day and a 5 day work week, 200 yards of material would be moved. If dredging is "diligent" and "continuous" as described in his plan of operations and if the work occurs "year round" a substantial amount of material will be moved. Realistically, if one assumes a 90 day dredging operation (California Department of Fish and Game dredging regulations allow a 130+ day season) and the 4 hour, 5 day work week scenario presented above, Mr. Jones would move a total of over

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1/ Appellant challenges this finding, arguing that he has not personally received any notice of noncompliance for activity in which he has been engaged on claim CAMC 151174. He asserts that any such notices were for actions taken on another claim by a deceased co-claimant. It is assumed, for purposes of this decision, that this statement by appellant is correct. The argument, however, is beside the point, for reasons later addressed in this opinion. Appellant also argues that he has "grandfathered" rights to dredge under rules promulgated by the California Department of Fish and Game. While this may be correct, he has not explained how that fact would affect the operation of Departmental regulations requiring that he file a mining plan of operations for mining in a scenic river. We conclude that he has not shown that State dredging rules affect the Federal requirement that there be compliance with 43 CFR 3809.1-4(b).

> 2,400 yards of material on his claim per season. This level of operation exceeds casual use both by its mechanized nature and by its potential for more than negligible disturbance.

(BLM Response filed Sept. 5, 1991, at 3).

[1] The principal issue before us, therefore, is whether BLM properly modified appellant's plan of operations. Resolution of the subsidiary issue whether a reclamation bond was properly required depends on how the first question is answered.

Citing regulations at 43 CFR Subpart 3809, appellant assumes that his operations, which he states will disturb less than 5 acres of Federal lands, can be considered to be "casual use," so as to be excepted from the requirement to provide a mining plan of operations. He argues that, because his use is casual, he need give no notice concerning his operations, and that the authorized officer need give no approval to any notices of mining operations provided by him.

Departmental regulation 43 CFR 3809.0-5(b) defines "casual use" to include

> activities ordinarily resulting in only negligible disturbance of the Federal lands and resources. For example, activities are generally considered casual use if they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in areas designated as closed to off-road vehicles. [Emphasis in original.]

Except for casual use, 43 CFR 3809.1-4(b)(2) requires that a plan of operations must be provided for any mining operation in areas designated for inclusion in the national wild and scenic river system. Since the Merced River where appellant's claim is found is such a system, any operation except casual use, regardless whether it comprises 5 acres or not, requires a plan of operations. The question concerning whether operations conducted by appellant are entitled to the exception is not answered, therefore, by measuring the area of his operations at any given time, but must consider whether or not the disturbance that will be created by his activity is negligible. BLM has determined that it is not, because of the nature of the machines he uses, and because past operations in the river indicate that more than a negligible disturbance will result from his dredging.

While appellant contends that he has not been allowed to file the notice of casual use for his claims, he has not furnished copies of any such notices that he attempted to file, nor does he claim that BLM has rejected notices offered by him pursuant to 43 CFR 3809.1-3(c). He takes the position that giving such a notice would automatically entitle him to mine without "notification to or approval by the authorized officer" regardless of the contents of the notice or the actual extent of operations to be

conducted, so long as it was claimed to be "casual use." This analysis of the regulations is incorrect: a miner may not avoid the rule at 43 CFR 3809.1-4(b)(2) merely by characterizing any activities in which he might be engaged as "casual use." On the contrary, the burden to show that he is entitled to an exception from the rule provided for such places as the Merced River scenic river rests with him. He must establish, as a matter of fact, that he is entitled to the exception claimed by him. See Pierre J. Ott, 122 IBLA 371, 374 (1992).

That appellant is operating dredges on the public lands is not denied. It is clear that he and his co-claimant have operated dredging operations in the manner described by the EA quoted above, and that the machinery that they use consists of the dredging machines described in the BLM response to appellant's statement of reasons. As we stated in Pierre J. Ott, supra,

> mining operations conducted [in the Merced River] generally require a plan of operations. An exception to this general requirement exists if the operations are so minimal that they constitute "casual use" within the meaning of 43 CFR 3809.0-5(b). To establish that such an exception exists, a miner must show that his operations will cause only a negligible disturbance. See 43 CFR 3809.0-5(b).
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> Appellants have not described their proposed operations to establish that their use is "casual." While they dispute the authority of BLM to regulate their operations in the manner proposed, they have shown no reason why they should not be required to file a plan of operations for their mining operation * * *.

Id.

The record before us supports the decision by the State Director that modified plan of operations 3809/CAMC 151174. Appellant has failed to show that he was entitled to an exception from the requirement that he file a plan of operations because his works would cause only negligible disturbance to the lands affected. The decision to modify the plan of operations is, therefore, affirmed.

[2] Nor has appellant suggested that the $1,000 reclamation bond required for his dredging operations is unreasonable, in light of the extent and duration of his activities on the river. See 43 CFR 3809.1-9(b) which authorizes BLM to require that a bond be furnished for any mining conducted pursuant to a plan of operations. Appellant has not challenged the amount of the bond required, but instead questions the authority of BLM to require or to administer a reclamation bond.

The bond requirement was properly established pursuant to 43 CFR 3809.1-9, once it was established that a plan of operations was required for the work. Appellant has not suggested that the regulation was not properly promulgated or that it does not apply to all cases where a plan

of operations is in effect. No error being shown in the decision to require that a reclamation bond be furnished pursuant to 43 CFR 3809.1-9, appellant was properly required to post a reclamation bond before commencing operations under the modified plan.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. ARNESS
Administrative Judge

I concur:

James L. Bairns
Chief Administrative Judge